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No. 94-455

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND JOHN PAYNE,
Petitioners,

v.

HOUSTON JONES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND THE U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, the denial of a public official's motion seeking summary judgment on qualified immunity grounds because the plaintiff failed to adduce any evidence showing wrongful conduct may be challenged in an interlocutory appeal.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The doctrine of qualified immunity is designed to enable state and local public officials to perform their duties by protecting them from the disruption and expense of trial, as

well as from liability for damages, where their actions do not violate clearly established law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Indeed, the Court has emphasized that an essential component of qualified immunity is the right not to stand trial in insubstantial cases. *See id.* Because that right is important to the functioning of state and local government, *amici* have a manifest interest in its protection.

Because the right to avoid trial is irretrievably lost if a trial court fails to grant summary judgment on qualified immunity grounds, the Court has recognized the necessity of permitting interlocutory appeals on the qualified immunity issue. The court of appeals' holding eviscerates that protection by forbidding appeals from the denial of summary judgment where the reason advanced for qualified immunity is the fact that no evidence exists that the public official did anything at all that would constitute a violation of the plaintiff's rights. Because such a distinction dramatically reduces a core protection of qualified immunity—the right not to stand trial in insubstantial cases—it is of significant concern to *amici*.

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt petitioners' statement of the case.

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. The qualified immunity doctrine reflects the reality that "damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The doctrine thus protects public officials when their actions do not violate clearly established law. It encompasses not only actions undertaken where the law is uncertain, but also actions which plainly violate no law. By providing a zone within which public officials may act without fear of litigation, qualified immunity reduces the risks that might otherwise inhibit public officials and prevent them from effectively carrying out their duties.

Qualified immunity protects public officials not only from liability for money damages, but also from "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (citation omitted). It is thus an entitlement to "*immunity from suit* rather than a mere defense to liability." *Id.* Accordingly, its protections require "[i]nsubstantial lawsuits [to] be quickly terminated." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citations omitted). The Court has recognized that the public official's entitlement to timely termination of insubstantial lawsuits can only be made meaningful if an interlocutory appeal is available where the trial court errs in denying qualified immunity.

2. This Court has held "that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell*, 472 U.S. at 530. Such a denial satisfies all three criteria of the collateral order doctrine: it is essentially unreviewable after

final judgment; it conclusively disposes of a public official's right not to stand trial; and it involves rights conceptually distinct from, and collateral to, the rights asserted by the plaintiff. *Id.* at 526-29.

Permitting interlocutory appeal of a denial of qualified immunity based on an erroneous legal assessment of the sufficiency of the evidence clearly falls within *Mitchell*'s "spirit and purpose." *Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 203 (8th Cir. 1986). Nothing in *Mitchell* supports the view that a distinction must be drawn, for purposes of interlocutory appeal, between the different varieties of legal error that might be responsible for a denial of qualified immunity.

Even if *Mitchell* does not conclusively address the appealability of an erroneous denial of qualified immunity on the grounds presented here, it is clear that such a denial falls within the collateral order doctrine. Because a public official's immunity from suit "is effectively lost if a case is erroneously permitted to go to trial," *Mitchell*, 472 U.S. at 526, a denial of qualified immunity at the summary judgment stage is unreviewable after final judgment, whether that denial is premised on a legal issue involving sufficiency of the evidence or one involving the clarity of the law. Relatedly, a denial of qualified immunity at the summary judgment stage "finally and conclusively determines the defendant's claim of right not to *stand trial*," *id.* at 527, regardless of the legal basis for that denial.

Finally, an appeal from a denial of qualified immunity on the legal ground at issue here "involve[s] a 'clai[m] of right separable from, and collateral to, rights asserted in the action.'" *Id.* at 527 (citation omitted). "[I]t follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28.

This conceptual distinctness is retained despite the fact that an examination of the factual record may be required to decide the qualified immunity issue, and despite the fact that the public official's appeal, if successful, will simultaneously determine the outcome of the case and dispose of the plaintiff's claim on the merits. *See id.* at 528-29; *Siegert v. Gilley*, 500 U.S. 226 (1991).

3. To make the appealability of a denial of qualified immunity turn on the type of legal error responsible for the denial would produce incongruous results and generate confusion and uncertainty among public officials. Instead of extending comprehensive protection from litigation and trial to all who stay within the bounds of clearly established law, such a view would withhold an important element of a public official's immunity from suit from those whose actions are on firm legal ground. The heightened risk that public officials who have done nothing wrong will nonetheless be forced to litigate insubstantial claims would be costly not only to the public officials involved, but to society as a whole.

ARGUMENT

THE DENIAL OF A PUBLIC OFFICIAL'S SUMMARY JUDGMENT MOTION ASSERTING QUALIFIED IMMUNITY MAY BE THE SUBJECT OF INTERLOCUTORY APPEAL ON THE GROUND THAT THE TRIAL COURT COMMITTED LEGAL ERROR IN CONCLUDING THAT A GENUINE ISSUE OF MATERIAL FACT WAS PRESENTED

A. Qualified Immunity Entitles A Public Official To Avoid Litigating Insubstantial Lawsuits

Qualified immunity is a judicially created response to the tension between the need for meaningful redress "[w]hen government officials abuse their offices," and the countervailing reality that "damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability will un-

duly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). As the Court explained in *Anderson v. Creighton*, "[o]ur cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Id.* (citations omitted). Qualified immunity protects public officials not only from liability for damages, but also from the risks and burdens of litigation and trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

1. *Qualified Immunity Protects Public Officials Who Act Within Clearly Established Legal Boundaries, As Well As Those Who Act Where The Law Is Unclear*

The doctrine of qualified immunity provides comprehensive protection to public officials who do not violate clearly established law. "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). An official, therefore, "is immune unless his actions violated clearly established law." *Mitchell*, 472 U.S. at 530 (citations omitted).[2] Qualified immunity protects not only the public official who acts in the face of unclear law, but also the public official whose actions are fully con-

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[2] *See also id.* at 528 (public officials immune unless "the law clearly proscribed [their] actions"); *Anderson v. Creighton*, 483 U.S. at 646 ("officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law"); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

sistent with the law. *See Siegert* v. *Gilley*, 500 U.S. 226, 231-33 (1991) (where no violation of constitutional right is asserted, defendant is entitled to summary judgment on qualified immunity grounds). Petitioners' defense that they did not violate respondent's constitutional rights is thus squarely within the scope of the qualified immunity doctrine.

This broad protection flows logically from the purposes of qualified immunity: "The conception animating the qualified immunity doctrine . . . is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."' " *Mitchell*, 472 U.S. at 525 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). As the Court recently reiterated, "[t]he central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.' " *Elder v. Holloway*, 114 S.Ct. 1019, 1022 (1994) (quoting *Harlow*, 457 U.S. at 806). The purposes of qualified immunity mirror those given by the Court for affording certain officials absolute immunity:

> The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Barr v. Matteo, 360 U.S. 564, 571 (1959).

Qualified immunity, therefore, provides a zone of conduct within which a public official may freely act without

fear of liability or the burdens, risks, costs, and distractions of trial—a zone which encompasses not only those areas in which the law is unclear, but also those areas which fall well within the bounds of clearly established law. A public official who stays within the zone of conduct delineated by the doctrine of qualified immunity is entitled to all of the benefits of qualified immunity, including protection from standing trial on insubstantial claims.

The need to afford public officials such a protected zone of action is apparent: "one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public. . . . Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices." *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974) (footnote omitted). Where officials are not protected, there is a cost "not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814 & n.22 (citing Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281, 324-27 (1980)). Public officials may undertake actions which minimize the chance of being sued but which are not the optimal ones, from the perspective of the public interest. *See Turner v. Dammon*, 848 F.2d 440, 444 (4th Cir. 1988); *see generally* Schuck, *Suing Our Servants*, 1980 S. Ct. Rev. 281.[3]

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[3] The incentive to engage in self-protective behavior may be particularly strong for local police officers—described by the Court as "that segment of the executive branch of a state government that is most frequently and intimately involved in day-to-day contacts with the citizenry and, hence, most frequently exposed to situations which can give rise to claims under § 1983." *Scheuer*, 416 U.S. at 244.

The clearest example of such "self-protective" behavior is inaction—such as the decision to ignore or walk away from suspicious behavior or an incident that is unfolding. *See* Schuck, *Suing Our Servants*, 1980 S.Ct. Rev. at 309. Interacting with members of the public, even where one's conduct unambiguously falls within well-established legal boundaries, entails some risk of a frivolous lawsuit based on that interaction, whereas (at least in certain discretionary settings) walking away poses virtually no risk of liability or reprisals. *See id.*; *see also Turner*, 848 F.2d at 444 ("the person aggrieved by official actions may be quite willing to sue, but the losses to society as a whole that come from official inaction may be more diffuse and thus less likely to result in a lawsuit").[4] Qualified immunity is designed to eliminate the incentive for self-protective behavior by providing comprehensive protection against frivolous lawsuits to public officials who stay within the bounds of clearly established law.

2. *Central To The Protection Afforded By Qualified Immunity Is An Entitlement To Termination Of Insubstantial Lawsuits At The Earliest Possible Stage Of The Litigation*

Qualified immunity, as formulated by the Court, protects public officials' freedom to act by shielding them from the consequences of actions which do not violate

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[4] The social costs associated with such self-protective behavior are significant. While society as a whole suffers, Professor Schuck has identified "silent victims" who bear the brunt of these social costs:

> [T]he silent victims I describe are individuals who must rely heavily upon street-level public services to assure their safety and well-being; they are almost certainly disproportionately poor and dependent. They are precisely the persons who can least afford to bear the costs of official self-protection, who are least likely to seek remedies, and whom a just society would least wish to burden.

Suing Our Servants, 1980 S.Ct. Rev. at 314.

clearly established law. *See, e.g., Mitchell*, 472 U.S. at 525; *Harlow*, 457 U.S. at 819. The "consequences" from which officials are protected, the Court has clarified, "are not limited to liability for money damages; they also include 'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.' " *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816). Thus, "[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert*, 500 U.S. at 232. Qualified immunity is an "entitlement [to] an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526.

This protection from litigation as well as from liability is designed to avoid the considerable social costs that are incurred when public officials are forced to litigate insubstantial claims:

> [C]laims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

Harlow, 457 U.S. at 814 (footnote and citation omitted). As the *Harlow* Court further explained, "[i]nsubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure." *Id.* at 819 n.35.

It was the Court's appreciation of these costs—the social and financial toll associated with requiring public officials to stand trial—that led it in *Harlow* to "refashion[] the qualified immunity doctrine in such a way as to 'permit the resolution of many insubstantial claims on summary judgment.'" *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 818). Because it appeared to the *Harlow* Court that the qualified immunity standard, as it was then formulated, stood in the way of the timely dismissal of insubstantial lawsuits, the Court adjusted the operative standard so that such early termination would be routinely available to public officials. *See Harlow*, 457 U.S. at 813-19.

As the Court explained in *Harlow*, "[i]n identifying qualified immunity as the best attainable accommodation of competing values . . . we relied on the assumption that this standard would permit '[i]nsubstantial lawsuits [to] be quickly terminated.'" 457 U.S. at 814 (citations omitted). Indeed, the *Harlow* Court described "the dismissal of insubstantial lawsuits without trial" as "a factor presupposed in the balance of competing interests struck by [its] prior cases." *Id.* In *Butz v. Economou*, the Court assumed that public officials would be able to quickly dispense with frivolous claims:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity.

438 U.S. 478, 508-09 (1978) (footnote and citation omitted); *see Harlow*, 457 U.S. at 819 n.35 (reiterating admonition in *Butz* "that 'insubstantial' suits against high public officials should not be allowed to proceed to trial").

In *Mitchell*, the Court identified two situations in which qualified immunity should entitle the defendant to quick termination of the litigation: First, "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." 472 U.S. at 526; *see also Harlow*, 457 U.S. at 818. Second, "[e]ven if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover sufficient evidence to create a genuine issue as to whether the defendant in fact committed those acts." *Mitchell*, 472 U.S. at 526.

The *Mitchell* Court went on to elaborate on this entitlement in the context of the first situation described—where the allegations fail to state a violation of clearly established law:

> *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell, 472 U.S. at 526 (emphasis in original). In such a case, qualified immunity shields the public official not only from trial, but also from discovery. To make this entitlement to expeditious termination of the litigation meaningful, interlocutory appeal must be available when a trial court erroneously denies qualified immunity in this context. *See id.* at 526-27.

The protections of qualified immunity should be equally available in the second situation set forth in *Mitchell*—where, despite the adequacy of the plaintiff's allegations, "discovery fails to uncover evidence sufficient to create

a genuine issue as to whether the defendant in fact committed those acts" and "the defendant is entitled to summary judgment." *Mitchell*, 472 U.S. at 526. While the public official in such a situation may not be able to avoid some measure of limited discovery, the purposes of qualified immunity require that the public official be protected from the further burdens of litigation and trial when limited discovery fails to yield sufficient evidence of wrongdoing.[5] Just as "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery," *Harlow*, 457 U.S. at 817-18, neither should a bare allegation of wrongdoing, unsupported by evidence that creates a genuine issue of disputed fact, suffice to subject a public official to such burdens. *See* 2 *Civil Actions Against State and Local Government* § 11.47, at 198 (Shepard's/McGraw-Hill) (2d ed. 1992).

In this situation, as in the first one set forth by the *Mitchell* Court, qualified immunity should protect public officials from the burden and expense of litigating insubstantial claims by requiring termination of the litigation at the earliest stage possible, consistent with providing the plaintiff an opportunity to present any relevant facts.

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[5] Pursuant to Rule 56(f), a party facing a summary judgment motion may request a continuance to conduct limited discovery to oppose the motion. *See* Fed. Rules Civ. Proc. 56(f). Whether or not discovery is available, of course, depends upon whether the plaintiff has satisfied the threshold pleading requirement. *See, e.g., Hobson v. Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Any such discovery must also be carefully limited. *See Anderson v. Creighton*, 483 U.S. at 646 n.6 (while "discovery may be necessary before Anderson's motion for summary judgment on qualified immunity can be resolved[,] . . . any such discovery should be tailored specifically to the question of Anderson's qualified immunity"). Moreover, the Court has emphasized that, "[i]n responding to [a summary judgment] motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz*, 438 U.S. at 508.

Accordingly, a public official faced with an erroneous denial of qualified immunity in this context should be permitted an interlocutory appeal to preserve his or her immunity from suit. As *amici* explain below, such a result is entirely consistent with the collateral order doctrine.

B. The Denial Of A Public Official's Entitlement Not To Stand Trial Is Immediately Appealable Pursuant To The Collateral Order Doctrine, Regardless Of The Specific Legal Issue Upon Which That Denial Turns

1. *A Denial Of Qualified Immunity Premised On A Determination That A Genuine Issue Of Fact Exists Is An Appealable Final Decision Under The Reasoning In* Mitchell

While 28 U.S.C. § 1291 broadly limits appellate jurisdiction to final decisions by district courts, the collateral order doctrine recognizes that certain decisions which do not terminate the litigation on the merits may nevertheless have special characteristics and consequences which require that they be treated as "final decisions" for purposes of permitting immediate appeal. In *Cohen v. Beneficial Industrial Loan Corp.*, the Court described the scope of the collateral order doctrine as encompassing

> that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

337 U.S. 541, 546 (1949); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

In *Mitchell*, the Court held "that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. at 530. The Court observed that the protection qualified immunity pro-

vides from litigation and trial would be irreparably lost if an erroneous denial of such immunity could not be immediately appealed. *See id.* at 526-27.[6] Applying the three-prong *Cohen* test, the *Mitchell* Court held that a denial of qualified immunity at the summary judgment stage is essentially unreviewable after final judgment, since a critical component of that immunity is the right not to stand trial; that such a denial conclusively disposes of a public official's right not to stand trial; and that the qualified immunity inquiry is conceptually distinct from, and collateral to, the merits of the case. *See* 472 U.S. at 526-29.

Whether a plaintiff has presented sufficient evidence to create a genuine factual issue is a question of law, albeit a question of law that turns on a preliminary assessment of the factual record. *See Wright v. South Arkansas Reg. Health Ctr., Inc.*, 800 F.2d 199, 203 (8th Cir. 1986).[7]

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[6] In this respect, qualified immunity is directly analogous to other protections against standing trial, the denial of which have been held to be immediately appealable. *See Abney v. United States*, 431 U.S. 651, 661-62 (1977) (double jeopardy clause protects individuals from "the personal strain, public embarrassment, and expense" of a second trial, and "these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken"); *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)) (claim that an indictment violates the Speech or Debate Clause is directly appealable, because "the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves' ").

[7] Detailed weighing of the facts is not necessary to decide the legal issue: "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In making this determination, "[t]here is no requirement that the trial judge make findings of fact." *Id.* at 250 (footnote omitted). Instead, "the inquiry performed is the threshold inquiry of determining whether there is the need for trial—whether, in

Because the Court in *Mitchell* held, without qualification, that a denial of qualified immunity is immediately appealable "to the extent it turns on an issue of law," 472 U.S. at 530, a denial of qualified immunity based on an erroneous legal assessment of the sufficiency of the evidence would appear to fall within the literal scope of the *Mitchell* Court's holding, as well as within its "spirit and purpose." *Wright*, 800 F.2d at 203.

The court of appeals assumed, however, that a distinction must be drawn, for purposes of interlocutory appeal, between denials of claims of qualified immunity which turn on legal questions involving the clarity of the law, and those which turn on whether the evidence presented by the plaintiff is legally sufficient to withstand a summary judgment motion. *See* Pet. App. 1a-2a. In other words, an appeal may be taken to preserve a public official's right not to stand trial when the trial court makes one type of legal error in denying qualified immunity, but not when the trial court makes a different type of legal error in denying the qualified immunity claim. An analysis of *Mitchell*, however, fails to support such a distinction between types of legal errors.

Mitchell identifies two types of legal errors that can result in denial of qualified immunity at the summary judgment stage. First, the trial court might erroneously conclude "that even if the facts are as asserted by the defendant, the defendant's actions violated clearly established law and are therefore not within the scope of the qualified immunity." *Mitchell*, 472 U.S. at 527. A chal-

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other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* The inquiry at the appellate level is similarly limited. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 719 (10th Cir. 1988) ("Our task in such an appeal is not to determine liability on a battle of affidavits, but to determine whether, on the basis of the pretrial record, there exists a conflict sufficiently material to defendants' claim of immunity to require them to stand trial.").

lenge to this legal conclusion would take the form of demonstrating that the law was *not* clearly established with respect to the actions the defendant alleges he took.

Second, the trial court might erroneously deny summary judgment upon concluding that "if the facts are as asserted by the plaintiff, the defendant is not immune." *Id.* There are two separate reasons why this denial might be erroneous. First, the trial court could simply be wrong in its assessment of the law; the defendant might be able to show that even if the plaintiff's assertions were true, they do not state a violation of clearly established law. *See id.* at 528; *Siegert,* 500 U.S. at 232-33.

Alternatively, as was the case here, the trial court might be correct in stating that "if the facts are as asserted by the plaintiff, the defendant is not immune," *Mitchell,* 472 U.S. at 528, but might nevertheless erroneously deny summary judgment where there is insufficient evidence to support the plaintiff's version of the facts. This is the situation mentioned earlier by the *Mitchell* Court—where "the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law," but "discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.' *Mitchell,* 472 U.S. at 526. In this case as well, the Court makes clear, "the defendant is entitled to summary judgment." *Id.*

This express recognition by the Court of a public official's entitlement to summary judgment in such a situation, coupled with the Court's insistence in *Harlow* on termination of insubstantial lawsuits at the earliest possible stage of the litigation, strongly suggests that legal errors falling into this category should be immediately appealable.[8]

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[8] The *Mitchell* Court's discussion of the "collateral" nature of the qualified immunity inquiry focused on legal errors involving the clarity of the law, rather than legal errors as to the sufficiency

2. *A Denial Of Qualified Immunity Based On The Determination That A Genuine Issue Of Fact Exists Satisfies The* Cohen *Criteria*

Even if *Mitchell* does not conclusively address the appealability of a denial of qualified immunity on the grounds presented here, an examination of the *Cohen* criteria provides the answer. *See Cohen*, 337 U.S. at 546; *Coopers & Lybrand*, 437 U.S. at 463. Like a denial of qualified immunity which turns on the clarity of the law, a denial of qualified immunity which turns on a legal error as to the sufficiency of the evidence is unreviewable on appeal from a final judgment, conclusively determines the public official's right not to stand trial, and involves a right separable from and collateral to the rights asserted in the action.

Unreviewable On Appeal From Final Judgment. As discussed above, a core component of qualified immunity is the public official's entitlement not to stand trial on insubstantial claims. The denial of a motion for dismissal or summary judgment on qualified immunity grounds amounts to a denial of this entitlement, which is unreviewable on appeal from a final decision. Once the public official is required to stand trial, his right to avoid standing trial is lost forever. As the Court explained in *Mitchell*, "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526. *See also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 687-89 (1993). Significantly, the trial court's denial of the "entitlement not to stand trial" component of qualified immunity is just as unreviewable after trial where that denial turns on the sufficiency of the evidence, as where it turns on the clarity of the law. *Cf.*

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of the evidence. *See Mitchell*, 472 U.S. at 527-28. However, as *amici* discuss below, *see* pp. 20-23, *infra*, similar analysis applies to the latter type of legal error.

Unwin v. Campbell, 863 F.2d 124, 132-33 (1st Cir. 1988).

Conclusively Determines The Disputed Question. Another criterion for interlocutory appeal is that the trial court's decision "must 'conclusively determine the disputed question.' " *Mitchell*, 472 U.S. at 527 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Here, the question of whether the public official will be required to stand trial or will be immunized from standing trial is conclusively determined by the trial court's denial of summary judgment. As in other situations in which interlocutory appeal has been permitted, no further steps can be taken by the public official to avoid being required to stand trial. *See Abney v. United States*, 431 U.S. 651, 659 (1977) (where double jeopardy claim is rejected "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee"); *Helstoski v. Meanor*, 442 U.S. 500, 507 (1979) ("[o]nce a motion to dismiss [on Speech or Debate Clause grounds] is denied, there is nothing the Member can do under that Clause in the trial court to prevent the trial").

It is obviously irrelevant that the trial court might change its mind about the availability of qualified immunity after a full trial. In *Mitchell*, the Court considered just such a situation, in which the trial court's erroneous holding as to the availability of qualified immunity at the summary judgment stage might later be corrected at trial:

> Even so, the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred," it is apparent that "*Cohen*'s threshold requirement of a fully consummated decision is satisfied" in such a case.

472 U.S. at 527 (quoting *Abney*, 431 U.S. at 659).[9]

Involves A Right Separable From, And Collateral To, Those Asserted In The Action. Finally, the question decided by the trial court "must involve a 'clai[m] of right separable from, and collateral to, rights asserted in the action.' " *Mitchell*, 472 U.S. at 527 (quoting *Cohen*, 337 U.S. at 546)). As the Court noted in *Mitchell*, "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." 472 U.S. at 527-28. This conceptual distinctness arises out of the fact that the immunity question is focused on deciding the immediate consequences for the public official—whether he or she will be subjected to the further burdens of discovery and trial. The question whether or not the public official is entitled to a quick termination of the lawsuit involves the public official's right to qualified immunity, a right that is plainly separable from and collateral to the rights asserted by the plaintiff.

Nor does the relevance of the factual record to the legal question at issue blur the conceptual distinction between the public official's asserted right to avoid trial and the plaintiff's asserted right to relief. The factual record will always bear upon the resolution of qualified immunity issues, even where the qualified immunity issue turns on a legal question involving the clarity of the law.[10] As the Court observed in *Mitchell*,

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[9] *Cf. Abney*, 431 U.S. at 660-61 ("[T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense.") (footnote omitted).

[10] For example, in *Anderson v. Creighton*, the Court explained that "the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable

> the resolution of . . . legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief; the same is true, however, when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause. . . . In holding these and similar issues of absolute immunity to be appealable under the collateral order doctrine, the Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue.

Mitchell, 472 U.S. at 528-29 (citations and footnote omitted).[11] It is quite clear from the *Mitchell* Court's treatment of the "separable and collateral" prong of the *Cohen* test, therefore, that a legal issue need not be totally unrelated to, or hermetically sealed from, the "facts" or the "merits" of the case in order to fall within the collateral order doctrine.

Likewise, the fact that an appellate court's decision as to the qualified immunity issue may decide the outcome of the case—or may, indeed, simultaneously decide the "merits" of the case—does not make the qualified immunity determination any less "collateral" under *Cohen*. Any successful appeal by a public official based on qualified immunity will be outcome determinative, whether the

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cause or exigent circumstances"—in other words, whether qualified immunity is available—"will often require examination of the information possessed by the searching officials." 482 U.S. at 641.

[11] *See also Puerto Rico Aqueduct & Sewer Auth.*, 113 S.Ct. at 689 (rejecting proposed distinction, for purposes of interlocutory appeal, between "cases in which the determination of a State or state agency's claim to Eleventh Amendment immunity is bound up with factual complexities whose resolution requires trial and cases in which it is not") (citing *Mitchell*, 472 U.S. at 527-29 & n.10).

initial denial of qualified immunity was based on a legal error as to the clarity of the law or a legal error as to the sufficiency of the evidence. In either case, the resolution of the defendant's entitlement to qualified immunity simultaneously disposes of the plaintiff's asserted right to relief.[12] Yet the Court has nevertheless considered the qualified immunity issue to be "collateral," based on the fact that its adjudication determines the public official's right not to stand trial—a right separable from, and collateral to, the rights asserted by the plaintiff. *See Mitchell*, 472 U.S. at 527-29.

This is true even where the basis for deciding the qualified immunity question bears unmistakably on the validity of the plaintiff's claim of right. In *Siegert*, the Court expressly addressed a situation in which the plaintiff "failed not only to allege the violation of a constitutional right that was clearly established at the time of [the public official's] actions, but he failed to establish the violation of any constitutional right at all." 500 U.S. at 233. There, the Court emphasized that the question whether the plaintiff had alleged a violation of a constitutional right must be resolved before discovery to preserve the public official's entitlement to avoid the burdens of litigation. *See id.* at 232.

The legal determination that the plaintiff has failed to allege a violation of a constitutional right could hardly bear more directly on the "merits" of the plaintiff's case. Such a determination is not only outcome determinative in a practical sense (i.e., the plaintiff loses), it also means that, as a matter of law, the plaintiff's claim had no legal

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[12] Of course, an unsuccessful appeal by a public official on qualified immunity grounds would not determine the merits or the outcome of a case. Where, as here, an appeal is based on the contention that insufficient evidence exists, the appellate court would be deciding no more than that sufficient evidence exists to go to trial; it is quite possible that the public official would still succeed on the merits at trial.

merit. Nevertheless, the resolution of this question was treated by the Court in *Siegert* as a proper subject of interlocutory appeal. *See Siegert*, 500 U.S. 226.

The Court's decisions therefore demonstrate that a qualified immunity issue may both implicate the factual record and decide "the merits" of the case without losing its "collateral" character under *Cohen*. The adjudication of a public official's entitlement not to stand trial is properly viewed as collateral to the merits because it determines a distinct right belonging to the public official, regardless of the extent to which the merits are directly implicated in that adjudication. Given this, there is no basis for denying a public official an interlocutory appeal of a denial of qualified immunity, simply because of the legal reason for that denial.

3. *To Make The Availability Of Interlocutory Appeal From A Denial Of Qualified Immunity Turn On The Legal Reason For The Denial Would Produce Incongruous And Inequitable Results*

The Court has emphasized that "the finality requirement should 'be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.' " *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976)). Yet to disallow interlocutory appeal from denials of qualified immunity simply because they are premised on the "wrong" type of legal error would do just that. Such a distinction between different types of legal errors for purposes of appealing a denial of qualified immunity would deny public officials a right this Court has described as central to the protection of qualified immunity—the right not to stand trial on insubstantial claims.[13]

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[13] Ironically, such a rule would weaken public officials' protection from frivolous lawsuits in precisely those circumstances in which the public official has acted on firm constitutional and statutory

Worse, such a distinction would perpetuate uncertainty among public officials as to the scope of protection provided them by the qualified immunity doctrine. Instead of being free to act within the protected zone of conduct defined by qualified immunity, secure in the belief that his or her right not to stand trial in insubstantial cases will be protected, the public official will be faced with uncertainty and risk. *See* Schuck, *Suing Our Servants*, 1980 S.Ct. Rev. at 325-27. A single error by a trial court as to the existence of a genuine issue of fact is sufficient to strip away the public official's protection against frivolous lawsuits, subjecting the official—and the community which that official serves—to the considerable costs and burdens of trial. This risk can be expected not only to dissuade some public officials from taking necessary action, but also to deter capable persons from seeking public service at all. *See id.* at 326 ("Qualified immunity undercuts vigorous decision making to the extent that its availability cannot be readily established."); *Harlow*, 457 U.S. at 814.

The social cost of litigation against public officials is demonstrated by the fiscal burdens which it places on local government. According to a 1992 survey conducted by the National Institute of Municipal Law Officers, over 80% of the responding jurisdictions reported increased litigation costs during the preceding two years, with the heaviest budgetary impacts falling disproportionately on the poorest jurisdictions and "the cities at each end of the size continuum." Susan A. MacManus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 834, 836 (1993). Specifically, police liability cases and civil rights cases were identified as "contributing

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ground; comprehensive protection from the burdens of trial would be available only to the extent the official's actions fell within the "gray areas" in which the law is unclear. *See Unwin*, 863 F.2d at 133 n.9 ("To afford the two defendants immunity only if the law had been a little less favorable to them would seem ridiculous.").

most to their rising litigation costs over the past three years." *Id.* at 839.[14]

Making appeal from a denial of qualified immunity unavailable where that denial is based on a determination that genuine issues of material fact exist could encourage strategic behavior on the part of plaintiffs, who might fill the record with insupportable assertions in the hope of manufacturing a factual dispute that would preclude summary judgment.[15] Because even plainly insubstantial claims take a good deal of time and money to litigate, a defendant that is unable to terminate the litigation at an early stage may settle the case rather than litigate it, even if ultimate success appears certain.[16] To the extent that erroneous denials of public officials' entitlement not to stand trial are unreviewable, plaintiffs' leverage in such cases is greatly enhanced, to the detriment of the public fisc.

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[14] A number of factors drive up the cost of these types of cases. For example, each such case "tends to be complex and quite lengthy," "frequently requires the use of outside counsel," and "tends to rely heavily on the testimony of expensive expert witnesses." MacManus, *The Impact of Litigation on Municipalities*, 44 Syracuse L. Rev. at 840.

[15] *See Turner*, 848 F.2d at 444 ("[i]t will seldom be difficult for a plaintiff to *plead* a violation of clearly established law"). *Cf. Anderson v. Creighton*, 483 U.S. at 640 n.2 ("[a] passably clever plaintiff would always be able to identify an abstract clearly established right that the defendant could be alleged to have violated").

[16] Rising costs of litigation have already led many municipalities to settle winnable cases as a cost containment measure. *See* MacManus, *The Impact of Litigation on Municipalities*, 44 Syracuse L. Rev. at 842 (81.4% of respondents "acknowledge they settle at least some of their 'winnable' cases just to save money"); *see also* International City/County Management Association, *Law Enforcement Officials Liability Insurance: Current Status—1991* 36 (1991) (analysis of closed liability insurance claims reveals "that the median defense cost[] is twice the median settlement cost").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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